



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 24 OF 2004

JAMES WILLY MWANZIA..... PLAINTIFF

MAZLIN SULTANALI KASSAMALI..... 2ND PLAINTIFF/CLAIMANT

V E R S U S –

THE COMMISSIONER OF POLICE.....1ST DEFENDANT

MULI MUTUA

THE HONOURABLE ATTORNEY GENERAL..... 2ND DEFENDANT

JUDGEMENT

1. By the plaint dated 16th January 2004, and amended on 17.3.2009, James Willy Mutunga Mwanzia, sought for judgement against Muli Mutua and the Attorney General, the 1st and 2nd defendants in the following terms:

1. ***General damages for unlawful arrest and confinement, false imprisonment and malicious prosecution.***
2. ***General damages for severe physical, psychological and mental torture.***
3. ***Aggravated and exemplary damages.***
4. ***A declaration that the defendants are bound to honour and repay the bank loan the plaintiff owes Industrial and Commercial Development Corporation and order compelling the defendants to repay the said loan.***
5. ***General damages for sexual dysfunction.***
6. ***Damages for loss of business @ the rate of ksh.35,000 per month from 20/8/1997.***
7. ***Costs and interest of this suit.***
8. ***Any other further relief that his honourable court deems fit to grant.***

2. The 2nd defendant filed amended statement of defence to oppose the plaintiff's claim.

3. The plaintiff summoned four (4) witnesses including himself to testify in support of his case. The plaintiff alleged that on or about 20.08.1997, Muli Mutua, the 1st defendant actuated by malice, contempt and spice maliciously and intentionally made a false report to Machakos Police Station that the plaintiff had violently robbed him of motor vehicle registration no. KAJ 663A. He further stated that he was arraigned before the chief magistrate's court at Machakos and charged in criminal case no. 3539 of 1997 and thereafter remanded in prison. The plaintiff further alleged that he was maliciously prosecuted and tortured on several occasions by police officers. He also averred that he was discharged on 26.7.1997 but later re-arrested and charged with a fresh charge

of robbery with violence contrary to section 296(2) of the Penal Code on 29.9.1997 before a Kangundo court. The plaintiff was found guilty and sentenced to suffer death on 24.6.1998 which conviction was later set aside on appeal. Upon his acquittal on appeal the plaintiff preferred this action for compensation. I have already enumerated the sort of orders the plaintiff applied.

4. The first defendant who was the complainant in the criminal case was also sued but the plaintiff did not take any step to effect service of summons.
5. The Attorney General, the 2nd defendant denied the allegations advanced by the plaintiff. The Attorney General specifically denied that the plaintiff was unlawfully arrested and maliciously prosecuted. It was further stated that the plaintiff was arrested and charged pursuant to a reasonable and probable cause in execution of a statutory duty after a complaint had been lodged and probable criminal offence, punishable in law established.
6. The following issues were put forward for the determination of this court.
 - i. Whether the plaintiff's prosecution was malicious and whether he is entitled to damages.
 - ii. Whether the plaintiff is entitled to damages for mental torture as a result of the arrest and subsequent prosecution?
 - iii. Whether the plaintiff is entitled to damages for the resultant loss?
7. On the first issue as to whether the plaintiff's prosecution was actuated by malice? In the case of **Kagane and others vs Attorney General (1969) 643** the principles required to establish malicious prosecution were restated as follows inter alia:
 - i. ***That the prosecution was instituted by a police officer.***
 - ii. ***That the prosecution terminated the case in the Plaintiff's favour.***
 - iii. ***That the prosecution process was done without reasonable or probable cause. The test for this condition is whether the material known to the prosecution would have satisfied a prudent and cautious man that the Plaintiff was probably guilty of offence.***
 - iv. ***That the prosecution was actuated by malice, i.e that the prosecution was motivated by something more than a desire to vindicate justice.***
8. In the case before this court, it is clear that the plaintiff's prosecution was instituted by a police officer and later terminated in favour of the plaintiff on appeal having been initially convicted and sentenced before the subordinate court. The conviction and sentence were quashed and set aside on appeal. There is no doubt that credible evidence was presented before the court which tried the criminal case which convinced the trial court to return a guilty verdict.
9. The other issue whether the prosecution was actuated malice.

The plaintiff (PW2) testified and summoned Dr. Khan (PW1) Peter Kimwe (PW3) and Paul Mwithi Kithaka (PW4) to testify in support of his case. None of the above witnesses gave evidence establishing malice either by spite or ill will or by indirect or improper motive on the part of the Attorney General. In short, I am satisfied that the prosecution was not motivated by something more than the desire to see that justice was done during the prosecution of the plaintiff. The proceedings in Machakos C.M.C.C no. 3539 of 1997 which were tendered as exhibits in evidence show that the police carried out its investigative duties before apprehending and eventually having the plaintiff prosecuted by the 2nd defendant. No evidence was presented to show that the 2nd defendant was actuated by malice while performing his constitutional and statutory duties. It is on record that Muli Mutua (1st defendant) made a report to the police which was to the effect that he had been violently robbed by the plaintiff of his motor vehicle and believing to be true the police giving into action nabbed the plaintiff and had him charged as aforesaid.

10. The other principle is whether the prosecution was instituted without a reasonable and probable cause. Looking at the material placed before this court, it is clear to me that the prosecutor

preferred a charge against the plaintiff before the court hearing the criminal case based on information which appeared reasonable and credible to an ordinary reasonable, prudent and cautious man. In his testimony the plaintiff (PW2) claimed that there was no identification parade conducted to identify the accused persons hence his arrest was without justification. I have carefully perused the proceedings of the criminal court and it is clear to me that the complainant (1st defendant) positively identified the plaintiff as one of the robbers who attacked him. Having come to the conclusion that there was a genuine complaint made by the 1st defendant to the arresting officer, a police officer, one can safely state that the arrest was lawful.

11.The plaintiff has prayed for damages for mental torture as a result of malicious prosecution. This court has come to the conclusion that the plaintiff's prosecution was without malice. It is therefore obvious in the circumstances that no damages is payable to the plaintiff.

12.This court has also been asked to award the plaintiff damages for loss. There is no doubt that the plaintiff was charged with the offence of robbery with violence which was not bailable at the time. It was therefore normal for him to be kept in custody under the law hence it was not possible for him to continue with this normal duties.

13.In the end, I find no merit in the suit. It is dismissed with costs to the 2nd defendant.

Dated, Signed and Delivered in open court this 27th day of May, 2016

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant